Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARNOLDO OZUNA GALAN,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred in placing the burden on the defendant to come forward with proof that the facts in the presentence report were untrue where the report contained only unsupported unsworn conclusions by the probation officer and unattributed hearsay conclusions by investigating officers of Galan's involvement in the offense and hence was insufficiently reliable to support the sentence.

2. Whether the double jeopardy clause precludes imposition of criminal sanctions where the defendant has previously been punished by the Bureau of Prisons for the same conduct but where the prison disciplinary proceeding in this particular case served no remedial purpose because it was subsequently reversed and expunged. Defendant, however, had by that time already been punished by the prison by being made to serve three months of disciplinary segregation and by being transferred to a higher security prison facility.

LIST OF THE PARTIES TO THE PROCEEDINGS BELOW

1. Arnoldo Ozuna Galan, Defendant
2. Kyle Franks, Defendant
3. Arcos Gilberto Lopez, Defendant
4. Joseph D. Marks, Defendant
5. Charles Randall Warrell, Defendant
6. United States of America, Plaintiff

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF THE PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

(a) Course of the Proceedings Below: 5
(b) Statement of Facts: 6

REASONS FOR GRANTING THE WRIT 6

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT UPHOLDING THE TRIAL COURT'S DENIAL OF THE ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY. IN UPHOLDING THE LOWER COURT, THE FIFTH CIRCUIT PLACED THE BURDEN ON THE DEFENDANT TO DISPROVE THE ALLEGATIONS OF THE PRESENTENCE REPORT EVEN THOUGH THE DISPUTED FACTS WERE CONCLUSORY HEARSAY AND LACKED

INDICIA OF RELIABILITY. IN SO DOING, THE FIFTH CIRCUIT ACTED CONTRARY TO PRECEDENT OF OTHER CIRCUITS WHICH HOLDS THAT THE GOVERNMENT BEARS THE BURDEN OF PRODUCING EVIDENCE TO SUPPORT ALLEGATIONS IN THE PRESENTENCE REPORT WHERE THE FACTS ALLEGED IN THE REPORT ARE CONCLUSORY AND BASED ON MULTIPLE HEARSAY. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THIS SPLIT. 6

(A) THE FIFTH CIRCUIT ERRED IN UPHOLDING THE TRIAL JUDGE'S ERRONEOUS PLACING OF THE BURDEN ON GALAN TO PROVE THE ALLEGATIONS OF THE PRESENTENCE REPORT WERE FALSE BECAUSE IT CONTAINED ONLY UNRELIABLE CLAIMS..... 13

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE IN DENYING GALAN'S DOUBLE JEOPARDY CLAIM, THE FIFTH CIRCUIT HAS ISSUED A RULING WHICH CONFLICTS WITH THIS COURT'S HOLDING IN *UNITED STATES V. HALPER*, 490 U.S. 435 (1989) AND THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT. 27

(A) THE FIFTH CIRCUIT ERRED IN HOLDING THAT GALAN'S CRIMINAL CONVICTION FOR THE SAME OFFENSE HE HAD BEEN PUNISHED FOR BY THE PRISON AUTHORITIES DID NOT CONSTITUTE DOULE JEOPARDY. 27

CONCLUSION.....30

Appendix Exhibit List

Appendix 1—Opinion of the United States Court of Appeals for the Fifth Circuit dated April 25, 1996. *United States v. Galan*, 82 F.3d 639 (5th Cir. 1996).

Appendix 2—Judgment Including Sentence of the United States District Court for the Western District of Louisiana dated May 5, 1995, and attached Memorandum Ruling in support of sentence.

Appendix 3—Rule 11(f) Factual Stipulation

Appendix 4—Presentence Report (pertinent parts)

Appendix 5—Galan's Objections to Presentence Report (pertinent parts)

Appendix 6—Addendum to Presentence Report

Appendix 7—Plea Agreement (pertinent parts)

TABLE OF AUTHORITIES

CASES

Austin v. United States,
113 S.Ct. 2801 (1993) 28

Department of Revenue v. Kurth Ranch,
128 L. Ed. 2d 767 (1994) 28

Garrity v. Fiedler,
41 F.3d 1150 (7th Cir. 1994) cert. den.,
115 S.Ct. 1420, 131 L. Ed. 2d 303 (1995) 28

In re Kurth Ranch,
986 F.2d 1308 (9th Cir. 1993) 28

North Carolina v. Pearce,
395 U.S. 711 (1979) 28

Townsend v. Burke,
334 U.S. 736, 92 L. Ed. 1690, 68 S.Ct.
1252 (1948) 14

United States v. Acosta,
85 F.3d 275 (7th Cir. 1996) 21

United States v. Anh Van,
No. 95-1919, 1996 U.S. App. Lexis 14769
(1st Cir. 6/18/96) 17

United States v. Badaracco,
954 F.2d 928 (3rd Cir. 1992) 23

United States v. Bluske,
969 F.2d 609 (8th Cir. 1992) 21,22

United States v. Brown,
59 F.3d 102 (9th Cir. 1995) 28

United States v. Elwood,
999 F.2d 814 (5th Cir. 1993) 19

United States v. Fry,
831 F.2d 664 (6th Cir. 1987) 21

United States v. Gainey,
No. 95-5744, 1996 U.S. App. Lexis 14777
(4th Cir. 5/21/96) 18

United States v. Galan,
82 F.3d 639 (5th Cir. 1996) 1

United States v. Gessa,
971 F.2d 1257 (6th Cir. 1992) 20,21

United States v. Graham,
83 F.3d 1466 (D.C. Cir. 1996) 20

United States v. Greene,
71 F.3d 232 (6th Cir. 1995) 20

United states v. Halper,
490 U.S. 435 (1989) 26,27,28

United States v. Harris,
44 F.3d 1206 (3rd Cir. 1995) cert. denied,
Harris v. United States, 131 L. Ed. 2d
731, 115 S.Ct. 1806 (U.S. 1995) 17

United States v. Hernandez-Fundora,
58 F.3d 802 (2nd Cir. 1995) 28

United States v. Kimball,
975 F.2d 563 (9th Cir. 1992) cert. den.,
507 U.S. 918 (1993) 22

United States v. Kinder,
946 F.2d 362 (5th Cir. 1992)] 14

United States v. Lawrence,
47 F.3d 1559 (11th Cir. 1995) 20,23

United States v. Leichtnam,
948 F.2d 370 (7th Cir. 1991) 21

United States v. Mahler,
984 F.2d 899 (8th Cir. 1992) 21

United States v. Makes Room for Them,
49 F.3d 410 (8th Cir. 1995) 22

United States v. McDowell,
888 F.2d 285 (3rd Cir. 1989) 17,18

United States v. Murillo,
902 F.2d 1169 (5th Cir. 1990) 19

United States v. Navarro,
979 F.2d 786 (9th Cir. 1992) 20

United States v. Newby,
11 F.3d 1143 (3rd Cir. 1993) cert. den. sub nom. Barber v. United States, 114 S.Ct. 1841, 128 L. Ed. 2d 468 (1994) 28

United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1984) 29

United States v. Patterson,
962 F.2d 409 (5th Cir. 1992) 19

United States v. Romano,
825 F.2d 725 (2nd Cir. 1987). 17

United States v. Terry,
916 F.2d 157 (4th Cir. 1990) 18

United States v. Tucker,
404 U.S. 443, 92 S.Ct. 589, 30 L. Ed. 2d 592 (1972) 15

United States v. Ursery,
No. 95-345, 1996 WL 340815, 64 U.S.L.W. 4565 (U.S.S.Ct. 6/24/96) 29

United States v. Vela,
927 F.2d 197 (5th Cir.) cert. denied, 502 U.S. 875, 116 L. Ed. 2d 172, 112 S. Ct. 214 (1991) 18,19

United States v. Vonsteen,
910 F.2d 187 (5th Cir. 1990)] 18

United States v. Weston,
448 F.2d 626 (9th Cir. 1971), cert. den.,
404 U.S. 1061 (1972) 15,20,22,23,24

United States v. Windle,
74 F.3d 997 (10th Cir.) cert. den., 134 L.
Ed. 2d 491 (1996) 22

United States v. Wise,
976 F.2d 393 (8th Cir. 1992), cert. den.,
113 S.Ct. 1592 (1993) 26

STATUTES

18 U.S.C., §371 1,5

18 U.S.C., §751(a) 2,5

28 U.S.C., §1254(1) 1

OTHER AUTHORITIES

F.R.Crim.P., §32(b)(6)(D) 3,15

F.R. Crim. P., §32(c)(1) 1,3,13

U.S.S.G., §3B1.1 3,7,8

U.S.S.G., §3E1.1 3

U.S.S.G., §6A1.3 4,14,15,21,24

OPINIONS BELOW

On April 25, 1996, the Fifth Circuit affirmed Arnoldo Galan's appeal of his sentence. *United States v. Galan*, 82 F.3d 639 (5th Cir. 1996). A copy of that opinion is attached as Appendix 1. No petition for rehearing was filed in the Fifth Circuit. The district court's judgment and sentence is attached as Appendix 2.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1996. No petition for rehearing was filed. This Court has jurisdiction under Title 28 *U.S.C.*, §1254(1), which provides that this Court may grant a petition for writ of certiorari by any party to a criminal case after rendition of judgment by a Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *U.S. Const.*, Amend. V (pertinent parts):

> No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . .

2. 18 *U.S.C.*, §371 (pertinent parts):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one

or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

3. 18 *U.S.C.*, §751(a):

(a) Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner [United States magistrate judge], or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both; or if the custody or confinement is for extradition, or for exclusion or expulsion proceedings under the immigration laws, or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined under this title or imprisoned not more than one year, or both.

4. Rule 32(c)(1), *F.R.Crim.P.*:

At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule

on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

5. Rule 32(b)(6)(D), *F.R.Crim.P.* (pertinent parts):

Except for any unresolved objection under subdivision (b)(6)(B),[1] the court may, at the hearing, accept the presentence report as its findings of fact.

6. *U.S.S.G.*, §3B1.1(a) (Nov. 1, 1995):

If the defendant was an organizer or leader or a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

7. *U.S.S.G.*, §3E1.1 (Nov. 1, 1995):

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[1] 32(b)(6)(B) provides that the parties may make objections to material information, sentencing classifications, sentencing guidelines ranges and policy statements contained in or omitted from the presentence report.

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease the offense level by 1 additional level.

8. *U.S.S.G.*, §*6A1.3* (Nov. 1, 1995):

Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present

information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The Court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), *Fed. R. Crim. P.* (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission or oral or written objections before imposition of sentence.

STATEMENT OF THE CASE

(a) Course of the Proceedings Below:

On June 16, 1994, Arnoldo Galan and four codefendants[2] were indicted in the Western District of Louisiana for conspiracy to escape from the Federal Correction Institution (FCI) at Oakdale in violation of 18 *U.S.C.*, §§371 and 751(a).

Mr. Galan entered a plea of guilty to the charge on February 10, 1995. On May 5, 1995, the district court denied him a reduction for acceptance of responsibility and increased his offense level by 4 points for being an organizer. The court sentenced him to a term of

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[2] The codefendants were Kyle Franks, Arcos Gilberto Lopez, Joseph D. Marks and Charles Randall Warrell.

imprisonment of thirty-seven (37) months, to perform two hundred (200) hours of community service, and to receive a term of three (3) years supervised release. *See*, Appendix 2.

Mr. Galan appealed his sentence to the Fifth Circuit Court of Appeals. He challenged the district court's reliance on unsubstantiated and conclusory allegations in the presentence report to deny him points for acceptance. He also challenged his conviction as violative of the double jeopardy clause of the Fifth Amendment because he had previously been punished for the same acts by prison officials. A panel of that Court rejected his arguments and affirmed his conviction on April 25, 1996. *See*, Appendix 1.

(b) Statement of Facts:

The facts as stipulated between Mr. Galan and the Government at the plea hearing were that around November 1, 1994, Mr. Galan, Kyle Franks and Arcos Gilberto Lopez, who were inmates at Oakdale, met to discuss an escape attempt. Originally the plan was to smuggle in explosive devices to be used to remove bars from a drainage system so that Galan, Franks and Lopez could escape. *See*, Stipulation attached as Appendix 3.

After the attempt to get explosives failed, the conspirators planned to use hack saw blades which had previously been smuggled in to cut through the bars of a cell. The escape attempt was on or about January 1, 1994, and was foiled. At no time during the attempt was human life seriously at risk. See, Appendix 3.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION

OF THE FIFTH CIRCUIT UPHOLDING THE TRIAL COURT'S DENIAL OF THE ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY. IN UPHOLDING THE LOWER COURT, THE FIFTH CIRCUIT PLACED THE BURDEN ON THE DEFENDANT TO DISPROVE THE ALLEGATIONS OF THE PRESENTENCE REPORT EVEN THOUGH THE DISPUTED FACTS WERE CONCLUSORY HEARSAY AND LACKED INDICIA OF RELIABILITY. IN SO DOING, THE FIFTH CIRCUIT ACTED CONTRARY TO PRECEDENT OF OTHER CIRCUITS WHICH HOLDS THAT THE GOVERNMENT BEARS THE BURDEN OF PRODUCING EVIDENCE TO SUPPORT ALLEGATIONS IN THE PRESENTENCE REPORT WHERE THE FACTS ALLEGED IN THE REPORT ARE CONCLUSORY AND BASED ON MULTIPLE HEARSAY. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THIS SPLIT.

After he was indicted, Mr. Galan entered into a "Plea Agreement" with the government which provided, among other things, that he would plead guilty to the conspiracy to escape charge. In return the government agreed not to oppose Mr. Galan's contention that he had recognized and accepted personal responsibility for his criminal conduct. Pertinent parts of the plea agreement are attached as Appendix 7. In addition, the government agreed that it would not oppose Galan's contention that he did not have an aggravating role under *U.S.S.G.* 3B1.1.

The original presentence report (PSR) set forth the offense conduct alleged to have been committed by Mr.

Galan. The pertinent parts of the presentence report are attached as Appendix 4. The report is unsworn. It fails to include the ultimate source for any of its "facts" stating only that it is based on "[i]nformation received by the U.S. Marshall's Service." *See*, Appendix 4, Para. 4. It is impossible, therefore, to determine where the Marshall's Service got its information and, consequently, whether the information is reliable.

Based on this information, however, the probation officer concluded that Mr. Galan was a leader or organizer of a criminal activity with more than five participants and should receive a four point increase in his base level offense pursuant to §3B1.1(a) *U.S.S.G.* Appendix 4, Para. 18. The sole basis for the probation officer's conclusion was her reliance on the Marshall's Service which purported to have:

> [i]nformation received throughout the investigation [which] identified . . . Galan and Franks[] as organizers of both escape attempts. Arnoldo Galan was identified as 'the money man.'

Appendix 4, Paras. 10, 18.

In her first report, the officer further recommended that Galan receive a two-level reduction for acceptance of responsibility based on his "acknowledg[ment of] his participation and involvement in the instant offense." She felt, however, that the three point reduction could not be awarded because Galan "did not timely provide information to the government; nor did he timely notify the government of his intention to enter a guilty plea." No facts were given to support this subjective conclusion that Galan's cooperation and notification were untimely. Appendix 4, Para. 13.

Mr. Galan objected to the presentence officer's determination that he was entitled to only a two level

reduction for acceptance of responsibility pointing out that the government had agreed not to oppose the reduction. He also disputed the probation officer's subjective conclusion that his acceptance was untimely. In addition, he argued that his agreement to plead was early enough to keep the government from having to prepare for trial or cause undue delay in the court's schedule. Pertinent portions of Galan's objections are attached as Appendix 5. *See*, Appendix 5, Intro. and Para. (8)

Galan also objected to the officer's conclusion that he was an organizer. Specifically, Galan challenged the allegation that he was in on the plan from the beginning. Rather he claimed that he joined after it had been initially organized by Lopez. *See*, Appendix 5, Para. (3).

In addition, Mr. Galan challenged paragraph 5 of the PSR. The PSR claimed that Galan had contacted his nephew, Fabian Ortiz, and arranged for him to buy four diamond cut carbon blades and smuggle them into Oakdale to Galan through a trustee. Galan, on the other hand, claimed that Lopez arranged for Lopez' brother to smuggle in the blades. Galan admitted acting as a lookout while Lopez and Franks cut the bars. Galan denied that Ortiz was involved. He maintained that Lopez organized and controlled the offense conduct. Appendix 5, Para. (4).

Galan also contested factual allegations in paragraph 6 of the PSR. He denied that his brother had arranged for a truck for the getaway and denied that his brother had arranged for any drivers. Galan claimed instead that Lopez's brother-in-law was to arrange for a van and that Lopez' sister and brother were to assist in the driving. Appendix 5, Para. (5).

Mr. Galan also objected to factual allegations in paragraph 7 of the PSR which claimed that after he failed to obtain larger stronger blades to cut the bars, he and Summers decided to use explosives to burn the pipes.

Instead, he claimed that after Lopez had failed to obtain the blades, Lopez and Summers, not Galan, decided to use detonation cord to burn the pipes. Appendix 5, Para. (6).

Galan denied participating in the second escape attempt involving an attempt to obtain detonation cord. *See*, allegations in paragraphs 8-9 of the PSR in Appendix 4. He claimed that at that time he was being held in administrative segregation. He also denied the probation officer's conclusion that he was the "money man." He further objected to the officer's characterization of him as the leader of the escape plot, claiming instead that Lopez was the organizer. Appendix 5, Para. (7).

In essence then, Galan claimed that the acts said by the probation officer to show a leadership role were in fact committed by Lopez. In response, the probation officer filed an Addendum. A copy of the pertinent parts of that Addendum is attached as Appendix 6. As for Galan's contention that he had not committed the acts in question and was not an organizer, the probation officer made the following conclusory response:

> The information contained in the offense conduct was information provided by the U.S. Marshal's [sic] Service. As stated in the Presentence Report, investigators determined that the defendant was an organizer of the escape plans. This determination was based on the information that the U.S. Marshal's [sic] obtained during the investigation.
>
> Defendant's version contradicts information obtained by the U.S. Marshal's [sic] Service and the facts as stated in the Indictment.

Appendix 6, A-32. The probation officer advanced no facts to support her contention that Galan rather than Lopez performed the acts in question.

Later, the officer repeated this rationale for increasing Galan's sentence for his leadership role:

> The investigation by the U.S. Marshal's [sic] Service clearly determined that the defendant was a leader in the instant offense. In addition the facts as outlined in the Indictment indicates [sic] that the defendant was a leader in the conspiracy.

Appendix 6, A-34.

In short, the probation officer offered not a single fact from which the district court could have determined where the information relied on by the Marshall's Service came from or why it was reliable or credible.

As for Galan's contention that his acceptance was timely and had not delayed the process, the probation officer made no response. Instead, she concluded that

> based on defendant's version of the offense, which contradicts the facts obtained by the U.S. Marshal's [sic] Service during the investigation, it is evidence the defendant has not clearly accepted responsibility.

Appendix 6, A-34. The probation officer, consequently, rescinded her initial recommendation that Mr. Galan receive a two point decrease and concluded instead that he should receive no credit for acceptance.

Despite the clear dispute between Galan and the probation office about the facts showing his involvement, the sentencing judge made no effort to determine even the exact content or source of the information which the

Marshall's Service claimed to have, much less whether the source was reliable. Neither did the court hold a hearing or require the probation officer to produce evidence to support her conclusions or those of the Marshall's Service.

Instead, in a "Memorandum Ruling," the trial court held that the burden was on Galan to show that the information was untrue and that his denial of the facts was insufficient to carry that burden. The Court further assumed that because Galan's claims were "self-serving," he must be lying. Consequently, the Court adopted the allegations of the presentence report and overruled Galan's objections. Accordingly, the court gave Galan the recommended four point leadership increase and denied him any points for acceptance of responsibility. A copy of that Memorandum Ruling was attached to the judgment and can be found as part of Appendix 2.

On appeal, Mr. Galan argued that the trial court had mistakenly placed the burden on him of going forward with evidence to show that the allegations of fact contained in the presentence report were false. The panel of the Fifth Circuit disagreed holding that the district court had acted correctly in refusing an acceptance of responsibility reduction because Galan had "contradicted the investigation of the probation office and attempted to minimize his involvement in the offense." Appendix 1, A-3. In other words, the Fifth Circuit upheld the lower court's reliance on the unsworn, conclusory allegations of the PSR to support the lower court's finding that Galan had lied about his participation and consequently should be denied the decrease for acceptance.

(A) THE FIFTH CIRCUIT ERRED IN UPHOLDING THE TRIAL JUDGE'S ERRONEOUS PLACING OF THE BURDEN ON GALAN TO PROVE THE ALLEGATIONS

OF THE PRESENTENCE REPORT WERE FALSE BECAUSE IT CONTAINED ONLY UNRELIABLE CLAIMS.

Rule 32(c)(1), *F.R.Crim.P.*, provides that the district court must rule on unresolved matters in the PSR and must append those findings to the report.

This section was placed in the rule to "ensure that a record is made as to exactly what resolution occurred as to controverted matter," and that this record comes to the attention of the Bureau of Prisons or the Parole commission when these agencies utilize the presentence report. Notes of Advisory Committed on Rules, reprinted in 18 U.S.C.A. following Rule 32 (West Supp. 1995). Both the language of the Rules and the notes make it clear that making and attaching findings to the report is mandatory.

Rule 32(b)(6)(D), *F.R.Crim.P.*, further provides that "*[e]xcept for any unresolved objection* under subdivision (b)(6)(B),[3] the court may, at the hearing, accept the presentence report as its findings of fact [emphasis added]."

Rule 32 requires then that the court have before it some evidence in addition to the presentence report where a defendant's objection to the report has not been resolved prior to the sentencing hearing. Rule 32 stresses the importance of resolving such factual disputes and making that resolution a part of the report.

The primary reason for this insistence on adequate fact finding is to ensure that a defendant is sentenced on the basis of reliable information. An adequate record enables an appellate court to make certain that the sentencing

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[3] 32(b)(6)(B) provides that the parties may make objections to material information, sentencing classifications, sentencing guidelines ranges and policy statements contained in or omitted from the presentence report.

court's procedures have complied with the due process requirement that a defendant not be sentenced on the basis of "materially untrue" statements or "misinformation." *Townsend v. Burke*, 334 U.S. 736, 741, 92 L.Ed. 1690, 68 S.Ct. 1252 (1948). The Guidelines recognize that because the court's resolution of disputed sentencing factors will usually have a "measurable effect on the applicable punishment, . . . disputes about sentencing factors must be resolved with care." *U.S.S.G.* §6A1.3, Commentary.

The problem in Galan's case is that the district court in violation of Rule 32 improperly resolved the factual dispute by relying solely on the presentence report without requiring an additional evidentiary foundation. Moreover, both the district court and the Fifth Circuit shifted the burden to Galan to go forward with evidence to prove that the conclusory allegations of the PSR were not merely unreliable, but that they were also untrue.

According to the district court, a defendant who disputes facts in the PSR must "do more than simply allege a different set of facts," he "must show that the information is materially untrue, inaccurate *and* unreliable [citing *United States v. Kinder*, 946 F.2d 362 (5th Cir. 1992)][4] [emphasis added]." Appendix 2, Memorandum Ruling, A-10. As a result of Galan's failure to do more than allege facts contrary to the PSR, the district court denied Galan an acceptance of responsibility reduction because his acceptance was untimely, and he had falsely denied his actions and had minimized his conduct. In doing so, the

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[4] Actually, the district court misquotes *Kinder*. The opinion says that the defendant must show that the information is materially untrue, inaccurate *or unreliable. United States v. Kinder*, 946 F.2d at 365. The district court is correct, however, in believing that the Fifth Circuit has at times placed the burden on the defendant to demonstrate the untruth of the facts in the report. *See*, discussion *infra*.

court expressly adopted the "facts as stated in the PSR." Appendix 2, Memorandum Ruling, A-10.

In other words, the only support for the court's finding derives from the conclusory, unsupported allegations of the report. In fact, since Galan had pled guilty, the court had no other evidence before it other than the factual stipulation and the plea agreement. Neither the factual stipulation nor the plea agreement supports the probation officer's conclusions. In fact, the government in agreeing that Galan was not a leader and that he had accepted responsibility, in effect, took a position contrary to that of the probation officer. Appendix 7.

The district court's findings that Galan had lied and his acceptance was untimely should only have been upheld by the Fifth Circuit if they were not clearly erroneous. Findings are clearly erroneous if the evidence on which they are based lacks sufficient indicia of reliability. *See generally*, *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *U.S.S.G.*, §6A1.3(a).

The presentence report on which the court relied, however, contains only the probation officer's conclusory allegations of wrongdoing which are in turn based on unattributed hearsay and conclusions from the Marshall's Office. Although the Guidelines allow a court to "consider relevant information without regard to its admissibility under the rules of evidence applicable at trial," they do require in the case of hearsay that such evidence also have "sufficient indicia of reliability to support its probable accuracy." *U.S.S.G.* §6A1.3(a) (Nov. 1, 1995).

This means that upon proper objection, the district court cannot sentence the defendant based only on a presentence report's conclusory factual recitals. *See*, Commentary, *U.S.S.G.* §6A1.3 (Nov. 1, 1995) which cites *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), cert. den., 404 U.S. 1061 (1972), for the proposition that

unreliable allegations may not be considered. In *Weston*, the Ninth Circuit held that conclusory unsupported contested allegations in the presentence report could not, consistent with due process, form the basis for a defendant's sentence. This was so even though the defendant did no more than come forward with conclusory denials of those allegations.

The Guidelines' citation to *Weston* would seem then to approve of *Weston's* requirement that the government bear the burden of producing evidence to show that the facts in the presentence report are true–at least where the report contains conclusory, unsworn allegations which, by definition, are unreliable. The problem and the reason why this Court should grant certiorari is that the Circuits have not uniformly agreed on who bears the burden of going forward with evidence where the defendant disputes the facts in a presentence report and what quantity of evidence will suffice to satisfy that burden.

The Sixth Circuit, for example, places the initial burden of challenging the information on the defendant, but does not require the production of any evidence. The Third and Ninth place the burden on the defendant to show that the information is unreliable by showing that it is conclusory or uncorroborated hearsay but then shift the burden to the government to prove the truth of the facts alleged. The First, Second, Seventh, Eighth, Tenth and Eleventh place the initial burden on the government to demonstrate that the information is reliable. Only the Fifth Circuit and arguably the Fourth require the defendant to come forward with evidence to demonstrate not only that

the conclusory or hearsay nature of the evidence makes it unreliable but that the evidence is in fact untrue.[5]

Turning to the tests in the individual Circuits, the First Circuit holds that the "government bears the burden of proving the facts material to the application of the guidelines by a preponderance of the evidence."[6] *United States v. Anh Van*, No. 95-1919, 1996 U.S. App. Lexis 14769, *4-5, (1st Cir. 6/18/96).

The Second Circuit likewise holds that the government has the burden of going forward with corroborating proof to establish the veracity of controverted hearsay evidence in a presentence report. *United States v. Romano*, 825 F.2d 725, 728-29 (2nd Cir. 1987). [when a defendant "challenges" the veracity of hearsay evidence in a presentence report the "government is required to introduce corroborating proof to insure the reliability of the evidence"].

The Third Circuit says that the presentence report constitutes prima facie evidence of a particular fact and places the burden of production on the party challenging the report to come forward with evidence that the presentence report is incorrect. *United States v. McDowell*, 888 F.2d 285 (3rd Cir. 1989). Where, however, the information in the report is merely conclusory or otherwise lacks reliability, the defendant satisfies that burden by merely alleging factual inaccuracies. The Third Circuit does not require that the defendant prove the falsity of presumptively unreliable allegations. *United States*

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[5] Both the Fourth and Fifth Circuits lack consistency in the test which they apply. The results seem to depend on which panel hears the case. *See*, discussion *infra*.

[6] As authority for the test, the Court cites the language of *F.R.Crim.P.*, §32(b)(6)(D) that says that the court may adopt the facts in the presentence report "except for any resolved objection."

v. Harris, 44 F.3d 1206, 1216 (3rd Cir. 1995) *cert. denied*, *Harris v. United States*, 131 L. Ed. 2d 731, 115 S.Ct. 1806 (U.S. 1995). All the defendant must show is that the evidence either is "incorrect or incomplete [emphasis added]." *United States v. McDowell*, 888 F.2d 285, 290 n.1 (3rd Cir. 1989).

The Fourth Circuit places an affirmative burden on the defendant to show that the information in the report is unreliable and to articulate the reasons why. Conclusory denials are insufficient to show the presentence report's inaccuracy. Where the defendant offers only such conclusory denials, the Court is free to adopt the presentence report without further inquiry as to the sufficiency of the facts. *United States v. Gainey*, No. 95-5744, 1996 U.S. App. Lexis 14777, *5 (4th Cir. 5/21/96). Although the Fourth Circuit at times talks about a burden to show the information in the report is unreliable, their insistence on more than conclusory denials by the defendant would indicate that the Fourth Circuit requires the defendant to actually demonstrate that the information is not only unreliable but untrue. *Id.*, at *6 [defendant has an "affirmative duty to show that the presentence report's information was inaccurate"]. *See*, *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) [The defendant has an "affirmative duty" to make a showing that the information in the presentence report is "unreliable, and articulate the reasons why the facts contained therein are untrue or inaccurate [emphasis added]"].

The Fifth Circuit most closely follows the Fourth Circuit in its approach to disputed sentencing facts. When disputing facts in the presentence report, the defendant must do more than simply allege a different set of facts, he must affirmatively show that the information is "'materially untrue' [quoting *United States v. Vonsteen*, 910 F.2d 187, 190 (5th Cir. 1990)]." *United States v. Vela*, 927

F.2d 197, 201 (5th Cir.) *cert. denied*, 502 U.S. 875, 116 L. Ed.2d 172, 112 S.Ct. 214 (1991).

The Fifth Circuit does require the information in the presentence report to bear "some minimum *indicium* of reliability," but the showing is indeed minimal. *Id.* For example, the Court has said that the district court can rely on conclusions in the presentence reports of investigative agents. *Id.*[7]

On the other hand, the Fifth Circuit has held that a recitation of conclusions by the DEA and the prosecutor in the PSR were insufficient to support an increase for a leadership role. *United States v. Elwood*, 999 F.2d 814 (5th Cir. 1993). Similarly, the Court held that an unsworn assertion by the AUSA in a report that the defendant was an organizer is insufficient to support an increase for being an organizer. *United States v. Patterson*, 962 F.2d 409, 414 (5th Cir. 1992).

Harmonizing the Fifth Circuit's decisions in this area is difficult, if not impossible. The only basis for distinguishing the situations in *Elwood* and *Patterson* and *Vela* and the instant case is that in Vela and Galan's cases, the report contained factual details which purportedly resulted from a government investigation; whereas, in *Elwood* and *Patterson*, the report contained only conclusions which are not directly attributed in the report

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[7] *See also, United States v. Murillo*, 902 F.2d 1169, 1172 (5th Cir. 1990) which affirmed reliance on the conclusion of a probation officer that the defendant was an organizer which was supported only by the government's "conclusory statements" contained in its objections to the presentence report "to the effect that 'countless aliens' were helped by Murillo and that her actions have 'severely compromised' the amnesty program." *Id.* In *Murillo*, the Fifth Circuit indicated that because probation officers routinely rely on investigative reports, the trial court was entitled to infer their reliability.

to an actual investigation. Whatever the rationale, however, no other Circuit finds information in a presentence report to contain sufficient indicia of reliability where, as in Galan's case, it is based solely on hearsay allegations from unidentified sources.[8]

Even the explanation that the Fifth Circuit is holding that facts contained in reports from the government are presumptively reliable fails to explain why the Fifth Circuit upheld the district court's reliance on the probation officer's totally conclusory statement that Galan's acceptance of responsibility was "untimely." Appellant can find no other circuit which holds that such a conclusory statement is a reliable basis for a sentence.[9]

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[8] *See, e.g., United States v. Gessa*, 971 F.2d 1257, 1267 (6th Cir. 1992) [factual allegation that the defendant was involved with a Colombian drug cartel was uncorroborated and should have been disregarded in light of defendant's objection to its truth]; *United States v. Greene*, 71 F.3d 232, 236 (6th Cir. 1995) [district court could not use an uncorroborated conclusory paragraph from an FBI report]; *United States v. Lawrence*, 47 F.3d 1559, 1563 (11th Cir. 1995) [statement in PSR that U.S. Attorney's Office had advised that they had evidence that the total amount of drugs was 2.8 kilograms was insufficient because it did not reveal the source of the information or the basis for the calculation. Moreover, court could not base the sentence on a proffer made by the prosecutor at the hearing that he could put on witnesses and video tapes of surveillance supporting the calculation].

[9] *See e.g., United States v. Graham*, 83 F.3d 1466 (D.C. Cir. 1996) [report insufficient which fails to state facts on which officer concluded that amount of drugs was foreseeable to defendant]; *United States v. Navarro*, 979 F.2d 786 (9th Cir. 1992) [court cannot rely on PSR stating merely that defendant responsible for a certain amount of drugs]; *United States v. Weston*, 448 F.2d 626, 630-31 (9th Cir. 1971) [facts in unsworn report from

As for the burden of production in the Sixth Circuit, that Court holds that the defendant initially bears the burden of challenging the accuracy of presentence report findings. The burden then shifts to the government to produce evidence to demonstrate the truth of the report. *United States v. Fry*, 831 F.2d 664, 667-68 (6th Cir. 1987).

The initial burden on the defendant to challenge the report, however, is minimal. All he must do is allege factual inaccuracies. The Sixth Circuit, unlike the Fifth, does not place an affirmative duty on the defendant to do more than object where the information in the PSR is conclusory or uncorroborated by reliable evidence. *United States v. Gessa*, 971 F.2d at 1267.

The Seventh Circuit holds that the government bears the burden of showing that the facts in the presentence report bear '"sufficient indicia of reliability to support [their probable accuracy' [citing USSG §6A1.3(a)]" *United States v. Acosta*, 85 F3d 275, 281(7th Cir. 1996). Once the facts are shown to bear such indicia of reliability, the burden shifts to the defendant to produce some evidence to demonstrate that those facts are unreliable. In the case of conclusory or unreliable hearsay allegations, the defendant can stand on a bare denial of the facts. *Id.*[10]

The Eighth Circuit holds that the presentence report is not evidence and is not a legally sufficient basis for making findings on contested issues of material fact. *United States v. Mahler*, 984 F2d 899, 905 (8th Cir. 1992); *United States v. Bluske*, 969 F.2d 609, 616 (8th Cir. 1992) [Presentence report not evidence]. The Eighth Circuit has

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investigating officers which quotes a named informant were insufficient to support a sentence].

[10] *E.g.*, United *States v. Leichtnam*, 948 F.2d 370, 381-82 (7th Cir. 1991) [PSR statement that "the government indicates Mr. Leichtnam was responsible for approximately four kilograms of cocaine" too unreliable to support sentence].

repudiated the view adopted by the Fourth and Fifth Circuits that the defendant must come forward with evidence to dispute allegations in the presentence report.

The Eighth Circuit places the burden on the government to introduce evidence sufficient to convince the court by a preponderance of the evidence that the fact in question exists. *Id.* Conclusory and unsupported statements in the presentence report will not support a sentence. *United States v. Makes Room for Them*, 49 F.3d 410, 417 (8th Cir. 1995).

The Ninth Circuit places the burden on the defendant of showing that information used in the presentence report is "false *or* unreliable." *United States v. Kimball*, 975 F.2d 563 (9th Cir. 1992) *cert. den.* 507 U.S. 918 (1993). On the other hand, where the information in the presentence report is based on unsworn evidence based on unverified statements of others, the burden of producing evidence is rather with the government to go forward with evidence demonstrating the reliability of the report. *United States v. Weston*, 448 F.2d at 633. In other words, the defendant satisfies his initial burden by showing that the information is unreliable where he can show that if it "'lacks some minimal indicium of reliability beyond mere allegation' [citation omitted]." *United States v. Kimball*, 975 F.2d at 566.

The Tenth Circuit, on the other hand, places the initial burden of proving factual matters on the government. *United States v. Windle*, 74 F3d 997 (10th Cir.) *cert. den.* 134 L.Ed.2d 491 (1996). The government can satisfy this burden by alleging sufficiently reliable facts in the presentence report. The burden of production then shifts to the defendant to "allege" factual inadequacies. The government must then go forward with evidence to dispute these factual inadequacies. *Id.*, at 1000.

The Eleventh Circuit also holds that when a defendant "challenges" the factual basis of his sentence in the PSR, the government has the burden of establishing the disputed fact by a preponderance of the evidence. *United States v. Lawrence*, 47 F.3d 1559, 1567 (11th Cir. 1995). Perfunctory PSR summaries of the evidence which fail to specify the source of the information and conclusory allegations of wrongdoing without underlying factual support cannot satisfy the government's burden. In short, such a PSR will lack the proper evidentiary foundation to support a sentence. *Id.*

In summary, the First, Second, Seventh, Eighth, Tenth and Eleventh Circuits place the burden on the government to produce reliable evidence to support the facts in the presentence report. The Third, Sixth and Ninth place the burden of production on the defendant, but in effect, shift it to the government where the allegations in the presentence report are based on conclusory or unsworn statements and are hence presumptively unreliable. Only the Fifth and arguably the Fourth have placed the burden on the defendant to affirmatively show that the facts in the presentence report are not only unreliable but also untrue.

The unfairness of requiring the defendant to prove the information is false in a situation like Galan's is readily apparent. First of all, Galan would have to prove a negative. In other words, the report says he did something. He would have to prove he did not. The difficulties in requiring someone to prove a negative have been noted by many courts. *E.g., United States v. Badaracco*, 954 F.2d 928, 935 (3rd Cir. 1992); *United States v. Weston*, 448 F.2d at 634.

Furthermore, not only would Galan be required to prove a negative, he would have to negate information from unnamed sources. All the report says is that some unspecified person in the Marshall's Office got information

from another unspecified place that Galan did certain things.

Even if Galan knew that the information came from one of his codefendants, for example, the only practical way he could demonstrate its falsity would be to call the codefendant to deny the allegations of the report. Compelling his codefendant to testify in the face of a self-incrimination claim would be impossible.

On the other hand, if the information has already been given to the government by an informant or codefendant as part of a cooperation deal or presentence investigation, the government, if it wished to rely on such information, could call that person as a witness. At the very least the government could present a statement from the person who provided the information. If the witness has already made the statements to the government or the probation officer, placing the burden on the government to actually produce the statement is a minimal hardship.

By contrast, placing the burden on the defendant is fraught with difficulties. The Ninth Circuit has succinctly summarized the problems inherent in the Fifth Circuit's approach in *United States v. Weston*, 448 F.2d at 634. *Weston* is the case cited by the Sentencing Commission in its Commentary for the proposition that unreliable allegations may not be considered in imposing sentence. *See*, Commentary, *U.S.S.G.*, §6A1.3 (Nov. 1, 1995). In rejecting the government's argument that the defendant should bear the burden of demonstrating the falsity of the unverified statements of an informant detailing additional criminal acts by Weston, the Court said:

> This will not do. It is tantamount to saying that once a defendant has been convicted of Offense A, narcotics agents can say to the probation officer, and the probation officer can say to the judge, "We

> think that she is guilty of much more serious offense B, although all we have to go on is an informer's report," and the judge can then say to the defendant, "You say it isn't so; prove that to me!" In addition to the difficulty of "proving the negative," we think it a great miscarriage of justice to expect Weston or her attorney to assume the burden and expense of proving to the court that she is not the large scale dealer that the anonymous informant says that she is.

Id., at 634.

The same is true here. In Galan's case, the source of the information is even less specific. We do not even know if it came from an informant. Given the vague, unsubstantiated nature of the hearsay in Galan's report, placing the burden of disproving the allegations is intolerably high. As in *Weston*, the allegations in Galan's case are not within his power to meaningfully refute.

Moreover, not only were the factual allegations of the report hard to refute, it was similarly impossible for Galan to refute the subjective conclusion of the probation officer that his acceptance was untimely. If the probation officer had facts to support her rationale, the trial court should have required her to come forward with it.

In requiring Galan to show the report was false, both the district and appellate court abdicated their responsibility to ensure that Galan's sentence was based on reliable information. As one court has said,

> The Guidelines do not reduce district court judges to mere automatons, passive compilers of ciphers, or credulous naifs who must accept as canon all that which is presented to them regarding a defendant's involvement in the crime charged or

> conduct relevant thereto. . . . The preponderance of the evidence standard . . . does not relieve the sentencing court of the duty of exercising the critical fact-finding function that has always been inherent in the sentencing process . . . . [The standard signifies] a recognition of the fact that if the probation officer and the prosecutor believe that the circumstances of the offense, the defendant's role in the offense, or other pertinent aggravating circumstances, merit a lengthier sentence, they must be prepared to establish that pertinent information by evidence adequate to satisfy the judicial skepticism aroused by the lengthier sentence that the proffered information would require the district court to impose.

United States v. Wise, 976 F.2d 393, 402-03 (8th Cir. 1992), *cert. den.*, 113 S.Ct. 1592 (1993).

Because of the conflict in the Circuits, this Court needs to clearly establish who bears the burden of producing evidence to prove the facts alleged in the presentence report. A failure to do so will result in continued sentencing disparity among the circuits. Such a result would negate the Guidelines' purpose of ensuring uniformity in sentencing. This Court should exercise its supervisory powers and grant certiorari to ensure that a defendant's sentence is not based on unreliable information in violation of the Guidelines and the Constitution.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE IN DENYING GALAN'S DOUBLE JEOPARDY CLAIM, THE FIFTH CIRCUIT HAS ISSUED A RULING WHICH CONFLICTS WITH THIS COURT'S HOLDING IN *UNITED STATES V. HALPER*,

490 U.S. 435 (1989) AND THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

This case began in June 1993, when Mr. Galan's codefendants devised an unsuccessful plan to escape from FCI Oakdale, Louisiana. As a result, Galan was indicted for conspiracy to escape. In addition, the Federal Bureau of Prisons imposed a series of disciplinary sanctions against Galan for the attempted escape. These included holding him in disciplinary segregation for 83 days, disallowance of 27 days of statutory good time and transferring him to a higher security level facility, namely the facility at Atlanta.

Eventually, the Bureau of Prison's Regional Office reversed the imposition of disciplinary sanctions. By this time, Galan had served the 83 days in disciplinary segregation and had been transferred to Atlanta where he remains at the time of this petition.

At trial and on appeal, Galan challenged the jurisdiction of the district court to impose sentence on him in this case on the ground that he had already been punished by the Bureau of Prisons and that the additional criminal punishment violated the double jeopardy clause of the Fifth Amendment. The Court of Appeals rejected Galan's argument that this Court's decision in *United States v. Halper*, 490 U.S. 435 (1989), precluded the district court from punishing him twice for the same offense.

(A) THE FIFTH CIRCUIT ERRED IN HOLDING THAT GALAN'S CRIMINAL CONVICTION FOR THE SAME OFFENSE HE HAD BEEN PUNISHED FOR BY THE PRISON AUTHORITIES DID NOT CONSTITUTE DOULE JEOPARDY.

In *North Carolina v. Pearce*, 395 U.S. 711 (1979), this Court interpreted the Fifth Amendment to protect an accused against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *See also, In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993) *aff'd in Department of Revenue v. Kurth Ranch*, 128 L.Ed.2d 767 (1994).

Later, in *Halper*, this Court held that the double jeopardy clause prohibits a second punishment by a civil penalty following a criminal penalty where the penalty is grossly disproportionate to the harm caused or "divorced from any remedial goal." *United States v. Halper*, 490 U.S. at 443, 446-51.

According to *Halper*, if a particular sanction "serves the goals of punishment," it constitutes punishment for the purpose of a Double Jeopardy analysis. *Id.*, at 448. If, on the other hand, the goal of the sanction is remedial only, then the sanction is not punishment under the Double Jeopardy Clause. *Halper* says that a civil penalty is punishment if it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also servicing either retributive or deterrent purposes." *Id. See also, Austin v. United States*, 113 S.Ct. 2801 (1993).

In the context of a prison disciplinary proceeding this would mean that if the disciplinary action were remedial only, then the imposition of disciplinary action would not constitute punishment. Consequently, imposing criminal sanctions in addition to prison discipline would not offend the Double Jeopardy Clause.[11]

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[11] See, *Garrity v. Fiedler*, 41 F.3d 1150 (7th Cir. 1994) *cert. den.* 115 S.Ct. 1420, 131 L.Ed.2d 303 (1995); *United States* v. *Brown*, 59 F.3d 102 (9th Cir. 1995); *United States v. Hernandez-Fundora*, 58 F.3d 802 (2nd Cir. 1995); *United States v. Newby*, 11 F.3d 1143

Adopting this rationale, the Fifth Circuit held that the disciplinary proceedings against Galan were primarily remedial rather than for the purpose of punishment. The Court concluded; therefore, that he was properly convicted and sentenced in criminal court. The problem with that holding is that it is not supported by the facts.

Once the Bureau of Prisons reversed the imposition of the disciplinary sanction against Mr. Galan, it served no remedial purpose at all. Moreover, by that time, Mr. Galan had already been punished by the Bureau of Prisons by serving 83 days in disciplinary segregation and by being transferred to a higher level prison. In short, Galan was punished twice for the same offense in violation of the Double Jeopardy Clause.

Galan's analysis is further supported by this Court's most recent interpretation of the Double Jeopardy Clause in *United States v. Ursery*, No. 95-345, 1996 WL 340815, 64 USLW 4565 (U.S.S.Ct. 6/24/96). That case involved the imposition of a criminal penalty after an *in rem* civil forfeiture of the defendant's property. In holding that the Fifth Amendment did not prohibit the two sanctions, this Court looked to the test in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). The test as quoted in *Ursery* is "'whether the [proceeding] is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial' [citation omitted]." *United States v. Ursery*, 1996 WL 340815, *7.

Regardless of what Congress may have intended, the disciplinary action in Galan's case was "by its nature necessarily . . . criminal and punitive." The reversal and subsequent expungement of the prison disciplinary proceeding destroyed any remedial aspects the proceeding

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(3rd Cir. 1993) *cert. den. sub nom. Barber v. United States*, 114 S.Ct. 1841, 128 L.Ed.2d 468 (1994).

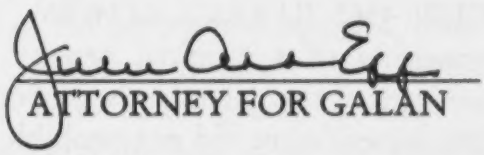
had and rendered it solely punitive. The Fifth Circuit, therefore, was in error when it concluded otherwise.

This Court should grant certiorari to ensure that the Appellate Courts follow its ruling in *Halper*.

CONCLUSION

This Court should grant certiorari to resolve the split in the Circuits over the burden of producing evidence to rebut contested allegations in presentence reports. Alternatively, the Court should grant certiorari to make sure that the Fifth Circuit follows the decisions of this Court.

Respectfully submitted,
ARNOLDO GALAN, Petitioner

BY: 
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ATTORNEYS FOR PETITIONER,
ARNOLDO GALAN

Appendix 1

OPINION OF THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
versus ARNOLDO OZUNA GALAN,
Defendant-Appellant.

No. 95-30491 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

82 F.3d 639; 1996 U.S. App. LEXIS 9918

April 25, 1996, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Western District of Louisiana. District No. 94-CR-20022. James T. Trimble, Jr., U.S. District Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Josette Louise Cassiere, Assistant U. S. Attorney, Office of the United States Attorney, Shreveport, LA.

For ARNOLDO OZUNA GALAN, Defendant-Appellant: Robert Gregg Levitt, Denver, CO.

JUDGES: Before JOLLY, JONES, and STEWART, Circuit Judges.

OPINIONBY: EDITH H. JONES

OPINION: EDITH H. JONES, Circuit Judges:

Appendix 1

OPINION OF THE FIFTH CIRCUIT

Appellant Arnoldo Ozuna Galan challenges the 37-month sentence he has received after pleading guilty to conspiracy to escape from a federal prison. He also disagrees with the district court's evaluation of additions to his base offense level. We find no error and affirm.

Galan first argues that the prosecution for conspiracy to escape is barred by double jeopardy concerns because he was punished in prison for the same conduct by being held in segregation subsequent to the offenses, being transferred to a higher security level facility, and losing good-time credit. Galan argues that this court has not reexamined its decision, issued before United States v. Halper, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 109 S. Ct. 1892 -50 (1989), which concluded that prison disciplinary proceedings do not bar future criminal prosecutions. See, e.g., United States v. Bryant, 563 F.2d 1227, 1230 (5th Cir. 1977), cert. denied, 435 U.S. 972 (1978). While this court has not reviewed the issue in light of Halper [*2] and other Supreme Court punishment-related cases, however, four other federal circuit courts have rejected appellant's contention. United States v. Brown, 59 F.3d 102, 103-05 (9th Cir. 1995); United States v. Hernandez-Fundora, 58 F.3d 802, 806-07 (2nd Cir.), cert. Denied, 115 S. Ct. 2288 (1995); Garrity v. Fiedler, 41 F.3d 1150, 1152-53 (7th Cir. 1994); cert. denied, 131 L. Ed. 2d 303, 115 S. Ct. 1420 (1995); United States v. Newby, 11 F.3d 1143, 1144-46 (3rd Cir. 1993), cert. denied, 114 S. Ct. 1841 (1994), cert. denied, 130 L. Ed. 2d 58, 115 S. Ct. 111 (1994). We see no reason to disagree with their uniform conclusion.

Galan also argues that the district court erred in denying him a reduction for acceptance of responsibility and in

increasing his offense level by finding him a leader in the escape attempt. We grant particular deference in reviewing these findings of fact. The district court refused to award Galan a reduction for acceptance of responsibility, in main part, because Galan contradicted the investigation of the probation office and attempted to minimize his involvement in the offense. The court, which had authority notwithstanding the plea agreement to make findings [*3] concerning Galan's leadership role, credited the PSR's statements that Galan organized his relatives to assist in the escape attempt, to maintain a safe house and to furnish transportation to Mexico. The district court did not clearly err in awarding either of these enhancements.

AFFIRMED.

Appendix 2

JUDGMENT AND SENTENCE OF DISTRICT COURT WITH ATTACHED MEMORANDUM RULING

UNITED STATES DISTRICT COURT
Western District of Louisiana

UNITED STATES OF AMERICA

V. Case Number CR 94-20022-01

ARNOLDO OZUNA GALAN
Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ARNOLDO OZUNA GALAN, was represented by Robert G. Levitt.

The defendant pleaded guilty to counts(s) 1 of a one count indictment. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 USC 371 and 751(a)	Conspiracy to Escape from a Federal prison	01/01/94	1

As pronounced on May 5, 1995, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Appendix 2

JUDGMENT AND SENTENCE OF DISTRICT COURT WITH ATTACHED MEMORANDUM RULING

It is ordered that the defendant shall pay to the Untied States a special assessment of $50.00, for count(s) 1, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 5th day of May, 1995.

S/ James T. Trimble, Jr.
United States District Judge

JUDGEMENT ENTERED May 8, 1995

Defendant's SSAN: 460-25-8335
Defendant's Date of Birth: 09/11/57
Defendant's address: 113 Arbor Avenue; Delrio, TX 78840

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 37 months. Said sentence is to be served consecutive to any other sentence now being served by the defendant.

The court recommends incarceration at USP Leavenworth, Kansas.

The defendant is remanded to the custody of the United States Marshall.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshall

BY _____
Deputy Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court(set forth below); and shall comply with the following additional conditions:

Appendix 2

JUDGMENT AND SENTENCE OF DISTRICT COURT WITH ATTACHED MEMORANDUM RULING

1. Report in person to the probation office as directed.
2. Shall not possess a firearm, destructive device, or illegal substance.
3. Shall participate in substance abuse treatment as directed by U.S. Probation office, to include urinalysis, at the defendant's cost.
4. Shall maintain employment and shall perform 200 hours of community service during the first 24 months of supervised release. While not employed, the defendant shall perform 40 hours of community service per week as directed by Probation.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

(1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

(2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

(4) The defendant shall support his or her dependents and meet other family responsibilities.

(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

(6) The defendant shall notify the probation officer within seventh-two hours of any change in residence or employment.

(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

(10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

(11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

(12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

(13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix 2
JUDGMENT AND SENTENCE OF DISTRICT COURT WITH ATTACHED MEMORANDUM RULING

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report except as noted in the attached Memorandum Ruling.

Guidelines Range Determined by the Court:

Total Offense level:	17
Criminal History Category:	III
Imprisonment Range:	30 months to 37 months
Supervised Release Range:	2 to 3 years
Fine Range:	$2,000 to $20,000
Restitution:	n/a

The fine is waived or is below the guidelines range because of the defendant's inability to pay.

The sentence is within the guidelines range, that range exceeds 24 months, and the sentence is imposed for the following reasons: Severity of offense and conformity with U.S.S.G.

Appendix 2

JUDGMENT AND SENTENCE OF DISTRICT COURT WITH ATTACHED MEMORANDUM RULING

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA Docket No. 94-20022-01

V. Judge Trimble

ARNOLDO OZUNA GALAN MAGISTRATE JUDGE WILSON

MEMORANDUM RULING

Presently before the court are multiple objections by the defendant, the majority of which are based on factual differences.

The first, second, third, fifth, seventh and eighth objections are factual. The defendant claims a different set of facts from those stated in the PSR, including denying that he was a leader or organizer of the escape attempts. When disputing the facts stated in a PSR, the defendant must do more than simply allege a different set of facts, the defendant must show that the information is materially untrue, inaccurate and unreliable. United States v. Kinder, 946 F.2d 362 (5th Cir. 1991), cert. den., –U.S.–, 112 S.Ct. 1677, 118 L.Ed.2d 394 (1992); United States v. Navejar, 5th Cir. Ct. App. Docket No. 91-5541, 6/8/92. The district court has wide discretion in evaluating the reliability of the information and whether to consider it. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991).

The defendant has offered no proof to the contrary (other than his self-serving testimony). Therefore, the court will specifically adopt the facts as stated in the PSR and OVERRULE the defendant's objections.

In his fourth objection, the defendant argues that he should have been granted three points for acceptance of responsibility rather than the two points assigned by probation. Because the facts stated in the objections to the PSR differed so extensively from those given by the Marshall's Service, Probation amended the PSR to delete any points for acceptance of responsibility. The defendant filed a Sentencing Memorandum, which the court received yesterday, in which he objects to Probation's amendment of the PSR, claiming that it is a retaliatory action.

Under U.S.S.G. §3E1.1(a), a district court may impose a two-level reduction for a defendant who "clearly demonstrates acceptance of responsibility." The assignment of two points for acceptance of responsibility is clearly within the court's discretion. An upward departure would be warranted if a defendant testifies to facts which would constitute perjury. See U.S.S.G. §3C1.1, commentary (n.3(b)). In U.S. v. Gleason, 25 F3d 605 (7th Cir. 5/20/94), the court held that the defendant had "provided false testimony [at a suppression hearing] concerning a material matter with the wilful intent to provided [sic] false testimony."[1] The district court went further, however, and also denied the defendant two points for acceptance of responsibility, terming the defendant's acceptance of responsibility as "halfhearted." Gleason, 25 F.3d at 608. The Court of Appeal affirmed the district court's decision.

The defendant in U.S. v. Kerr, 13 F.3d 203 (7th Cir. 1993) was refused two points for acceptance of responsibility even though he made an impassioned oratory

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[1] U.S. v. Dunnigan, –U.S.–, –, 113 S.Ct. 1111, 1116, 122 L.Ed.2d 445 (1993).

at sentencing professing shame and a willingness to make amends. The Court of Appeal noted that:

> This is a speech that many articulate defendants make in more or less the same words. The speech may reflect the true nature of its maker. If the words sound hackneyed it may be because the speakers are all people facing the same future, a time in prison. But the words may also be pious cant, the right thing to say in the circumstances, but not the truth." Kerr, 13 F.2d at 204.

This court, as the court in Kerr will reject the claim of acceptance of responsibility because the defendant [sic] because the court believes that the defendant's "remorse" comes through an attempt to manipulate the system, not from genuine remorse. A defendant's failure to demonstrate truthfulness and remorse prior to the "final hour" is certainly a factor upon which a judge may rely in determining that a defendant has failed to accept responsibility.[2] The defendant argues that he accepted responsibility for the escape and is merely contesting his role as a leader. §3E1.1 requires that the defendant not just admit to the crime, but not deny his part in relevant conduct. See §3e1.1, application note 1(a).

Although when interviewed by Probation, the defendant originally accepted responsibility and was granted a two point reduction, the facts, as stated in the objections submitted by the defendant are clearly inconsistent with that earlier acceptance of responsibility. In U.S. v. Daivs, 14 F.3d 605 (7th Cir. (Ill.) 12/17/93), an

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[2] U.S. v. Osborne, 931 F.2d 1139, 1155 (7th Cir. 1991).

unpublished opinion, the defendant lied at her sentencing hearing. The court held that "the defendant's perjury at the hearing on her guilty plea was inconsistent with her earlier acceptance of responsibility" and refused to grant the two point reduction. The court concurs with this decision as the facts, as stated in the PSR, make it clear that the defendant is not assuming responsibility beyond the mere act of pleading guilty. Therefore this objection is OVERRULED.

In his sixth objection, the defendant asserts that the guideline computation should be recomputed based upon his objections. For the reasons stated previously, this objection is also OVERRULED. The defendant's guideline will remain 17, criminal history category III, range 30-37 months.

S/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT COURT

Appendix 3

RULE 11(f) FACTUAL STIPULATION

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

UNITED STATES OF AMERICA

CRIMINAL NO. CR94-20022-01

V.

JUDGE TRIMBLE

ARNOLDO OZUNA GALAN

MAGISTRATE JUDGE WILSON

RULE 11(f) FACTUAL STIPULATION

NOW INTO COURT come the United States of America through the undersigned Assistant United States Attorney, the defendant, ARNOLDO OZUNA GALAN, and undersigned defense counsel, who for the purpose of satisfying the requirements of Federal Rule of Criminal Procedure 11(f) do stipulate as follows:

Beginning on or about the 1st day of November, 1993, the defendant, ARNOLDO OZUNA GALAN, was an inmate at the FCI Oakdale, located in Oakdale, Louisiana. While there the defendant, ARNOLDO OZUNA GALAN, and others decided to escape from the federal facility. Initially the plan was to smuggle in explosive devices that were to be used to remove bars from a drainage system so that the defendant, ARNOLDO OZUNA GALAN, and the other co-conspirators could escape from Oakdale.

Appendix 3

RULE 11(f) FACTUAL STIPULATION

On or about the 1st day of November, 1994, ARNOLDO OZUNA GALAN, and other co-conspirators, including Kyle Franks and Arcos Gilberto Lopez, met and discussed the escape attempt. After an attempt to get explosives failed, the defendant, ARNOLDO OZUNA GALAN, and the other co-conspirators were going to use hack saw blades that had been previously smuggled into the facility, to cut through the bars of a cell. After leaving the cell the co-conspirators planned to escape through the fence. The escape attempt was on about January 1, 1994. As a result the escape attempt was foiled. At no time during the escape attempt was human life seriously at risk.

_____ _____

ARNOLDO OZUNA GALAN — Date Signed
Defendant

_____ _____

ROBERT G. LEVITT — Date Signed
Counsel for Defendant

_____ _____

JOHN LUKE WALKER (18077) — Date Signed
Assistant United States Attorney
600 Jefferson Street, Suite 1000
Lafayette, Louisiana 70501-7206
(318) 262-6618

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. Arnoldo Ozuna Galan is charged in a one-count Indictment filed in the Western District of Louisiana on June 16, 1994. Count I charges that beginning on or about, the 1st day of November, 1993, and continuing until on or about the 1st day of January, 1994, in the Western District of Louisiana and elsewhere, the defendants, Arnoldo Ozuna Galan, Kyle Franks, Arcos Gilberto Lopez, Joseph D. Marks, and Charles Randall Warrell did knowingly and intentionally conspire, confederate and agree together and with others, both known and unknown to the grand jury to commit a crime against the United States, that is escape from a federal prison, to wit: FCI Oakdale, Louisiana, a facility in which the defendants, Arnoldo Ozuna Galan, Kyle Franks, Arcos Gilberto Lopez, and Charles Randall Warrell, were lawfully incarcerated, in violation of Title 18, United States Code, Section 751(a).

2. The defendant appeared in U . S . District Court, Lake Charles, Louisiana. on February 10, 1995, before the Honorable James T. Trimble, Jr., and pled guilty to Count I of the Indictment as charged. A Presentence Investigation was ordered. Sentencing is set for May 5, 1995. The defendant was continued in detention as previously ordered on September 16, 1994.

Related Cases

3. None.

The Offense Conduct

4. Information received by the U.S. Marshall's Service indicated that approximately June, 1993, a plan had been initiated by Gilberto Arcos Lopez and Arnoldo Galan to escape from F.C.I. Oakdale, Oakdale. Louisiana. At this time other inmates who actively participated in the planning of the escape were Jesus Bazan, Kyle Franks, Charles Warrell, Anthony Summers, Charles Ordner and a trustee identified only as "Reno". In June. 1993 the inmates began looking for the best area on the compound to escape. Their first choice was in the rear of the compound near the yard where utility vehicles entered the compound. This area had the longest stretch of fenced area without sensors. After further evaluation of the site, a second location was chosen near Rapides One, near Leonel Bazan's cell. This location was chosen for the timed sightings of the patrol vehicles that checked the perimeter of the compound and its obscurity.

5. Once the location of the plan had been agreed upon, tools to implement the escape were needed. Duties were assigned to each inmate, in an effort to efficiently organize a timely escape. Fabian Ortiz, the nephew of Arnoldo Galan, was contacted by Galan via telephone. Fabian bought four diamond cut carbon blades in San Antonio, Texas, along with a wrench and an oil can. These items were brought to F.C.I. Oakdale by Ortiz and left there upon Galan's instructions. Galan arranged for a trustee, identified as "Reno" to get the items and smuggle them into the compound, through the back gate area, which was used by the trustees. "Reno's" job was to measure the drainage pipes, check it's interior and to

determine what would be needed to open the tunnel. Arcos Lopez and Kyle Franks were to do the actual cutting of the cell bars and pipes. Charles Warrell was to time all patrol units and the shifting of the guards, as well as inmate checks. Warrell came up with the plan to start a fire on the compound to divert the patrol units and guards away from their escape site. Bazan and Galan were to act as "look outs", while Lopez and Franks cut the cell bars and pipes.

6. Another decision of the group was to decide on a safe place once the escape occurred. Several locations were discussed. A location of 12th Street in Oakdale was rented through the assistance of Charles Ordner. A van would be waiting at this location to take the inmates to Glenmora, Louisiana. The group was unable to come up with any drivers for the escape. Rogelio Galan provided Arnoldo Galan an eighteen wheeler truck that was purchased with Louisiana tags. The truck had a false compartment and was to be parked at the Glenmora location, near a catfish restaurant parking lot. The initial departure scheme was from the van to the truck to Mexico. The drivers were to be furnished by Rogelio Galan.

7. In November, 1993, Arnoldo Galan could not obtain larger and longer size diamond cut carbon blades to cut the rebarb pipes that were welded in the openings of the drainage pipes. It was at this time that Galan and Summers decided to use explosives to burn the pipes.

8. On November 14. 1993, Anthony Leon Summers, an inmate at FCI Oakdale, telephoned Beaumont Police Officer J.B. Pittman, asking Pittman to assist him in

obtaining a detonation cord for an escape plan at the prison. Summers was contacted by inmates Arnoldo Galan and Gilberto Lopez. He wanted to trade two ounces of cocaine for 20 feet of detonation cord. Summers told Galan and Lopez that he could get the cord and provided Pittman's telephone number as the contact person. On November 15, 1993, Pittman received a call from an individual named "Polo", who gave a return telephone number of 210-349-1664. Pittman advised his supervisor, Lt. Jimmy Singletary, of the plot. Singletary contacted the Beaumont Alcohol, Tobacco, and Firearms Office and requested their assistance. Larry Sanders, ATF Agent, gave Pittman his pager number with instructions for Polo to contact him. Pittman advised Sanders that the cord was to be used to smuggle someone out of prison. On November 17, 1993, Polo paged Sanders from 210-213-7132. Polo indicated that he would soon be coming to Beaumont to meet with Sanders and would page him the night before the meeting. On November 19, 1993, Sanders received a page from a local telephone number. Sanders called the number and spoke with an individual who identified himself as "Joe". Joe indicated he was in Beaumont for Polo and had a "Christmas present" for Sanders, and in turn was to pick up a package. The meeting was arranged between Sanders and Joe. On November 19, 1993, a surveillance team was formed. It was decided to get the subject to front an ounce of cocaine, and in turn, Sanders would show him a sample of the detonation cord. At 7:30 p.m. Sanders met Joe at 3955 Eastex Freeway, Beaumont, Texas. Joe was identified by the description of his clothing that he gave to Sanders. Joe told Sanders that he was instructed to give him a package. Joe gave Sanders a white plastic sack with a

metal canister inside. Sanders examined the package which contained a baggie of white powdered substance. In turn, Sanders showed Joe a piece of the detonation cord. Joe looked at the cord and made a phone call to determine if the change in arrangements would be okay. Joe told Sanders that the people he talked to said, "To do whatever he said". Sanders told Joe that the final exchange (the other ounce of cocaine for the detonation cord) would take place the following week. Sanders told Joe to tell Polo to call him for the next arrangements. After the transaction was completed, Joe was stopped by Beaumont Police and identified as Joseph Glen Harran. Harran was released.

9. On November 23, 1993, Sanders attempted to contact Polo. On the 24th of November, 1993, contact was made. Polo wanted to complete the exchange for the cord with money instead of cocaine. Sanders advised Polo that he would have to contact his people and call him later. Sanders contacted Polo by telephone in an attempt to convince him to complete the transaction with cocaine. Polo stated that he would check on it and call Sanders back. On December 6, 1993, Sanders was contacted by Mark through his beeper. Sanders telephoned the number on his beeper, 210-658-0342. Mark advised Sanders that he had a package of sugar for him. A meeting was set for the exchange. It was determined the number left on the beeper by Mark was assigned to Joseph D. Marks. Further investigation revealed that Marks' name and phone number were on Arnoldo Galan's inmate phone list at FCI Oakdale. On December 7. 1993, Sanders received two messages from 210-658-0342. Sanders returned the call and spoke with Mark. Mark wanted to know if everything was ready.

Sanders also spoke with "Harvey" during this conversation and gave him directions to the meeting place. Mark inquired about how the explosives worked. On the same day, Sanders recontacted Mark and questioned as to whether Mark wanted the explosives rigged for detonation. Mark indicated that he did not, but wanted all of the parts and wanted Sanders to show Harvey how to rig the explosives for detonation. During this conversation, Mark stated that he wanted to make sure the rope would work on the truck or frames. On December 7, 1993, Sanders received a local page from 842-8956. Sanders called the number and spoke with Harvey. Harvey stated they were at the location as planned. Sanders made contact with Harvey and another individual named "Mike". The exchange was made. Sanders explained to Harvey how to tape the blasting cap with the safety fuse and the detonation cord. Sanders also explained how to operate the igniter. Once the exchange was concluded, Harvey and Mike were detained and transported to the ATF office for questioning. Mike was identified as Michael Dickey and Harvey was identified as William Harvey Stewart. Both indicated they were asked by Joseph D. Marks to pick up the package and deliver it to him. Harvey was asked to cooperate and assist agents by delivering the dummy device to Marks. Harvey agreed. Harvey went to Marks' residence and delivered the device as planned. During the delivery, Harvey showed Marks how to operate the device. Drug Enforcement Agency agents moved in and executed the Federal search warrant on Marks' residence. During the search, approximately two pounds of marijuana, three rifles, one shotgun and two handguns were seized. A handwritten note was recovered with directions to the exchange place, Sander's name and

beeper number. Another note was seized indicating that "Fabian" had contacted Marks and told them that Sanders did not have the rope ready yet and that more money and one more of those things (meaning the second ounce of cocaine) was needed. Sanders advised Marks of his rights and identified himself as the person he had been talking with during the exchange. Marks admitted that one of Arnoldo Galan's nephew's, Alberto Fabian Artese, was to come by and get the device. Marks attempted to call Artese in the presence of Sanders. It was determined that Artese lived in San Antonio and that his phone number was the original telephone number of Polo. It was also determined that Alberto Fabian Artese was in fact Polo.

10. Information received throughout the investigation identified Lopez as an organizer of the first escape attempt involving the saw blades. Galan and Franks were identified as organizers of both escape attempts. Arnoldo Galan was identified as "the money man".

11. There is no victim in the instant offense.

<u>Adjustment for Obstruction of Justice</u>

12. The probation office has no information suggesting that the defendant impeded or obstructed justice.

<u>Adjustment for Acceptance of Responsibility</u>

13. The defendant has acknowledged his participation and involvement in the instant offense. However, he did not timely provide information to the government, nor did he timely notify the government of his intention to

enter a guilty plea; therefore, he will receive a two-level reduction for acceptance of responsibility.

Offense Level Computation

14. The guideline manual dated November 1, 1994, is being used to calculate the guideline score.

15. **Base Offense Level:** The guideline for 18 USC 751(a) is found in Section 2P1. 1.
The base offense level is thirteen. 2P1.1(a)(1). 13

16. **Specific Offense Characteristics:** None. 0

17. **Victim-Related Adjustment:** None. 0

18 **Adjustment for Role in the Offense:** Section 3Bl.l(a) states if the defendant was an organizer or leader of a criminal activity that involved five or more participants, increase by four levels. As stated in Paragraph ten, the defendant was identified as an organizer of the escape attempt which involved at least five participants; therefore, four levels are added. 3Bl.1(a). +4

19. **Adjustment for Obstruction of Justice:** None. 0

20. **Adjusted Offense Level (Subtotal):** 17

21 . **Adjustment for Acceptance of Responsibility:** As previously stated, the defendant will receive a two point reduction for acceptance of responsibility. 3E1 . 1-2

22. **Total Offense Level:** 15

Appendix 5

OBJECTIONS TO PRESENTENCE REPORT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA,
Plaintiff

vs. Criminal Action No. CR-94-20022-01

ARNOLDO OZUNA GALAN,
Defendant,

DEFENDANT'S OBJECTIONS TO PRESENTENCE REPORT

COMES NOW the Defendant, by and through his undersigned counsel, and respectfully files his objections to the presentence Report that has been prepared in this cause.

INTRODUCTION

The Defendant entered into a written plea agreement (see copy of enclosed agreement) which addressed both factual and legal stipulations in this cause. specifically, the Government agreed not to oppose the Defendant's contention that he has recognized and accepted personal responsibility for his criminal conduct. In addition, the Government agreed not to oppose the Defendant's contention that he did not have an aggravating role in the instant offense pursuant to U.S.S.G. Section 3B1.1 and that the Defendant shall not have his sentence enhanced pursuant to this provision. It was also agreed that the Government would not oppose the Defendant's

contention that he be sentenced at the lowest end of the applicable guideline range. **Finally, the Government agreed not to oppose the Defendant's request that he be transferred to the Republic of Mexico pursuant to the Prisoner Transfer Treaty.**

Both the U.S Attorney's office and defense counsel have agreed to certain factual stipulations pursuant to Rule 11(t) as attached hereto.

Specific objections to the presentence Report are as follows:

(1)

The Defendant's official legal name is "ARNOLDO GALAN" and not "ARNOLDO OZUNA GALAN"

(2)

The Defendant has completed his GED and thus his level of education is at least a 12th grade equivalent.

(3)

PARAGRAPHS 4. The Defendant states that the correct facts are as follows: Information received by the U.S. Marshall's Service indicated that approximately June, 1993, a plan had been initiated by Gilberto Arcos Lopez and others (not including Defendant Galan at this time) to escape from F.C.I. Oakdale, Oakdale, Louisiana. At this time other inmates who actively participated in the planning of the escape were Jesus Bazan and Kyle Franks (inmate Charles Warrell was in Oakdale II at that time, and

the other inmates including Anthony Summers, Charles Ordner and a trustee were not involved at this time). In June, 1993 the inmates began looking for the best area on the compound to escape. Their first choice was in the rear of the compound, near the yard where utility vehicles entered the compound. This area had the longest stretch of fenced area without sensors. After further evaluation of the site, a second location was chosen near Rapides One, near Jesus Bazan and Gilberto Lopez's cell. It is at this time that Lopez invited Defendant Galan in this escape attempt. This location was chosen for the timed sightings of the patrol vehicles that checked the perimeter of the compound and its obscurity.

(4)

PARAGRAPH 5. The Defendant states that the correct facts are as follows: Once the location of the plan had been agreed upon, tools to implement the escape were needed. Duties were assigned to each inmate, in an effort to efficiently organize a timely escape. It was Lopez's brother from Florida that was contacted by co-defendant Lopez via telephone in order that Lopez's brother would bring in diamond cut carbon blades. Lopez's brother brought into the institution these items along with a wrench and DW 40. It was co-defendant Lopez that arranged for a trustee to get these items into the institution and smuggle them into the compound. Again, Charles Warrell was in Oakdale II at this time and thus not an active participant Defendant Galan and Bazan acted as look outs while co-defendant Lopez and Franks cut the bars and pipes. The Defendant denies any involvement by Fabian Ortiz in the offense conduct. Furthermore, the Defendant asserts that the

offense conduct as charged was organized and controlled by Gilberto Arcos Lopez.

(5)

PARAGRAPH 6. The Defendant states that the correct facts are as follows: Another decision of the group was to decide on a sate place once the escape occurred. Several locations were discussed. A location of 12th Street in Oakdale was rented by the assistance of Charles Ordner. A van would be waiting at this location to take inmates to Glenmora, Louisiana. It was the brother-in-law of co-defendant Lopez who was in charge of driving the van. Co-defendant Lopez's sister came from Mexico to assist in the driving as well as Lopez's brother from Florida. Rojelio Galan was never mentioned as a participant in this escape attempt. It was Lopez's family who were responsible for all transportation plans.

(6)

PARAGRAPH 7. The Defendant states that the correct facts are as follows: In November 14, 1993, Gilberto Lopez, not Defendant Galan, could not obtain larger and longer size diamond cut carbon blades to cut the rebarb pipes that were welded in the openings of the drainage pipes. It was at this time that Lopez and Summers, not Galan, decided to use the detonation cord to burn the pipes.

(7)

PARAGRAPH 10. The Defendant was not involved in a second escape attempt since during such time period, the Defendant was held in segregation. In addition, at no time

was the Defendant a "money man" in an escape attempt as all overt acts were controlled exclusively by co-defendant Lopez.

(8)

PARAGRAPH 13. The Defendant objects to the probation officer's contention that the Defendant has not accepted complete acceptance of responsibility pursuant to 3E1.l thereby affording him a three (3) level reduction. The Defendant did in fact timely notify Assistant united States Attorney John walker of his intent to enter into a negotiate [sic] plea agreement consistent with application note 6 of Section 3E1.1. Although the Defendant filed pre-trial Motions, his decision to plead guilty and accept responsibility was "sufficiently early in the process" so as to permit the Government not to prepare for trial or cause undue delay in the Court scheduling process.

(9)

PARAGRAPH 18. The Defendant objects to the Probation Officer's contention that the Defendant was an organizer or leader pursuant to U.S.S.G. Section 3Bl.1(a). The Defendant denies that he occupied an organizer an leadership role in any act set forth in the indictment. This assertion is further supported by the Government's tacit support of this position as codified in the Defendant's plea agreement.

(10)

PARAGRAPH 22. The Defendant asserts that the offense level computation should be presented as follows:

Appendix 5

OBJECTIONS TO PRESENTENCE REPORT

OFFENSE LEVEL COMPUTATION

BASE OFFENSE LEVEL:	13
*ACCEPTANCE OF RESPONSIBILITY:	-2
ADJUSTMENT FOR ROLE IN THE OFFENSE:	0
TOTAL OFFENSE LEVEL:	11

ADDENDUM TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF LOUISIANA
UNITED STATES V. ARNOLDO OZUNA GALAN,
DOCKET NO.94-20022-01

OBJECTIONS

By the Government

As of this date there have been no objections received from the government.

By the Defendant

Objection #1: Counsel for the defendant, Robert G. Levitt, states, "The defendant's legal name is "Arnoldo Galan" and not "Arnoldo Ozuna Galan"."

Response: None.

Objection #2: Mr. Levitt, states, "The defendant has completed his GED and thus his level of education is at least a 12th grade equivalent."

Response: The defendant did indicate he received his GED in 1978 at a private school in Delrio, Texas.

Objection #3: Regarding paragraphs 4, 5, 6, 7 and 10, Mr. Levitt, states, "The defendant states that the correct facts are as follows: Information received by the U.S. Marshal's Service indicated that in approximately June, 1993, a plan had been initiated by Gilberto Arcos Lopez and others (not

including Defendant Galan at this time) to escape from F.C.J. Oakdale, Oakdale, Louisiana. At this time other inmates who actively participated in the planning of the escape were Jesus Bazan and Kyle Franks (inmate Charles Warrell was in Oakdale II at that time, and the other inmates including Anthony Summers, Charles Ordner and a trustee were not involved at this time). In June, 1993 the inmates began looking for the best area on the compound to escape. Their first choice was in the rear of the compound, near the yard where utility vehicles entered the compound. This area had the longest stretch of fenced area without sensors. After further evaluation of the site, a second location was chosen near Rapides One, near Jesus Bazan and Gilberto Lopez's cell. It is at this time that Lopez invited Defendant Galan in this escape attempt. This location was chosen for the timed sightings of the patrol vehicles that checked the perimeter of the compound and its obscurity.

Once the location of the plan had been agreed upon, tools to implement the escape were needed. Duties were assigned to each inmate, in an effort to efficiently organize a timely escape. It was Lopez's brother from Florida that was contacted by codefendant Lopez via telephone in order that Lopez's brother would bring in diamond cut carbon blades. Lopez's brother brought into the institution these items along with a wrench and DW 40. It was co-defendant Lopez that arranged for a trustee to get these items into the institution and smuggle them into the compound. Again, Charles Warrell was in Oakdale II at this time and thus not an active participant. Defendant Galan and Bazan acted as look outs while co-defendant Lopez and Franks cut the bars and pipes. The Defendant denies any involvement by Fabian Ortiz in the offense conduct. Furthermore, the

Defendant asserts that the offense conduct as charged was organized and controlled by Gilberto Arcos Lopez.

Another decision of the group was to decide on a safe place once the escape occurred. Several locations were discussed. A location of 12th Street in Oakdale was rented by the assistance of Charles Ordner. A van would be waiting at this location to take inmates to Glenmora, Louisiana. It was the brother-in-law of codefendant Lopez who was in charge of driving the van. Co-defendant Lopez's sister came from Mexico to assist in the driving as well as Lopez's brother from Florida. Rogelio Galan was never mentioned as a participant in this escape attempt. It was Lopez's family who were responsible for all transportation plans.

In November 14, 1993, Gilberto Lopez, not Defendant Galan, could not obtain larger and longer size diamond cut carbon blades to cut the rebarb pipes that were welded in the openings of the drainage pipes. It was at this time that Lopez and Summers, not Galan, decided to use the detonation cord to burn the pipes.

The defendant was not involved in a second escape attempt since during such time period, the Defendant was held in segregation. In addition, at no time was the Defendant a "money man in an escape attempt as all oven acts were controlled exclusively by co-defendant Lopez."

Response: The information contained in the offense conduct was information provided by the U.S. Marshal's Service. As stated in the Presentence Report, investigators determined that the defendant was an organizer of the escape plans. This determination was based on the

information that the U.S. Marshal's obtained during the investigation.

Defendant's version contradicts information obtained by the U.S. Marshal's Service and the facts as stated in the Indictment.

Objection #4: Counsel for the defendant states the government agreed not to oppose the defendant's contention that he has recognized and accepted personal responsibility for his criminal conduct. Regarding paragraph 13, Mr. Levitt states, "The defendant objects to the Probation Officer's contention that the Defendant has not accepted complete acceptance of responsibility pursuant to 3B1.l thereby affording him a three (3) level reduction. The Defendant did in fact timely notify Assistant United States Attorney John Walker of his intent to enter into a negotiate plea agreement consistent with application note 6 of Section 3E1.1. Although the Defendant filed pre-trial Motions, his decision to plead guilty and accept responsibility was "sufficiently early in the process" so as to permit the Government not to prepare for trial or cause undue delay in the Court scheduling process.

Response: The plea agreement does state the government will not oppose the defendant's contention that he has recognized and accepted personal responsibility for his criminal activity. However the plea agreement also states that the final determination is within the sole and exclusive power of the court.

The defendant was credited with acceptance of responsibility, because it was felt he had acknowledged his

involvement in the instant offense. However based on defendant's version of the offense, which contradicts the facts obtained by the U.S. Marshal's Service during the investigation, it is evident the defendant has not clearly accepted responsibility. Therefore defendant should not be credited with a two point reduction for acceptance of responsibility. The offense level is therefore 17 and the guideline range 30 to 37 months. The fine range is $5,000 to $50,000.

Objection #5: Regarding paragraph 18, Mr. Levitt, states, "The Defendant objects to the Probation Officer's contention that the Defendant was an organizer or leader pursuant to U.S.S.G. Section 3B1.1(a). The Defendant denies that he occupied an organizer or leadership role in any act set forth in the indictment. This assertion is further supported by the Government's tacit support of this position as codified in the Defendant's plea agreement."

Response: The investigation by the U.S. Marshal's Service clearly determined that the defendant was a leader in the instant offense. In addition the facts as outlined in the Indictment indicates that the defendant was a leader in the conspiracy .As part of the plea agreement the government does state that it will not oppose the defendant's contention that he did not have an aggravating role in the instant offense pursuant to 3B1.1. However the plea agreement also states the final determination as to the defendant's role will be determined by the Court. A four point enhancement for a leadership role is appropriate.

Objection #6: Regarding paragraph 22, Mr.. Levitt states the total offense level should be 11.

Response Refer to response to objection #4.

Objection #7: Regarding paragraph 35, the defendant indicates that he was educated through the seventh grade in Mexico.

Response: None.

Objection #8: Regarding paragraph 37, the defendant states, he has a serious epileptic condition in which he receives or should receive regulated medication at least three times per day. He experiences regular seizures and his medical condition will likely deteriorate over the next several years.

Response: None.

Respectfully submitted,
WILLIAM R. SAYES CHIEF U.S.
PROBATION OFFICER

By: S/ Betty J. Boutte
U. S. Probation Officer

BJB :btr
Typed and mailed April 24, 1995.

Approved:

DATE: April 24, 1995

S/William H. Sexson
SUPERVISING U.S. PROBATION OFFICER

APPENDIX 7
PLEA AGREEMENT

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

UNITED STATES OF AMERICA
CRIMINAL NO. CR94-20022-01

V.

JUDGE TRIMBLE

ARNOLDO OZUNA GALAN
MAGISTRATE JUDGE WILSON

PLEA AGREEMENT

The following sets forth the complete details of the plea agreement between the UNITED STATES OF AMERICA and the defendant, ARNOLDO OZUNA GALAN, under which the defendant, ARNOLDO OZUNA GALAN, will enter a plea of guilty to Count I of the Bill of Indictment, charging him with conspiracy to commit escape, in violation of Title 18, United States Code, Section 371.

THE UNITED STATES OF AMERICA AGREES:

IF THE COURT SHOULD ACCEPT THE DEFENDANT'S, ARNOLDO OZUNA GALAN, PLEA OF GUILTY AND SHOULD THE DEFENDANT FULLY COMPLY WITH HIS OBLIGATIONS AS SET FORTH HEREIN, THEN THE UNITED STATES OF AMERICA:

APPENDIX 7

PLEA AGREEMENT

1. Agrees that the UNITED STATES OF AMERICA shall not further prosecute the defendant, ARNOLDO OZUNA GALAN, for any other criminal violations arising out of or related to the matter set forth in the Bill of Indictment, or arising out of or related to the facts and circumstances underlying and surrounding the matter set forth in .the Bill of Indictment.

2. The UNITED STATES OF AMERICA will not oppose the defendant's contention that he has recognized and accepted personal responsibility for his criminal conduct. Both the defendant and the UNITED STATES OF AMERICA understand and agree that the final determination as to whether the defendant has in fact so recognized and accepted personal responsibility is within the sole and exclusive power of the Court.

3. The UNITED STATES OF AMERICA reserves the right to correct any factually erroneous information proffered by the defendant or his counsel.

4. The UNITED STATES OF AMERICA does not oppose the defendant's contention that he be sentenced at the lowest end of the applicable guideline range. However, both the defendant and the UNITED STATES OF AMERICA recognize and agree that the final determination of the appropriate sentence is within the sole and exclusive power of the Court.

5. The UNITED STATES OF AMERICA will not oppose the defendant's contention that he did not have an aggravating role in the instant offense pursuant to the definitions of U.S.S.G. Section 3B1.1 and that the defendant shall not have his sentence enhanced pursuant to this provision. Both the defendant and the UNITED STATES OF AMERICA understand and agree that the final determination as to the defendant's role will be determined by the Court.

6. The United States Attorney's Office for the Western District of Louisiana will leave to the sole discretion of the United States Attorney General or other person or persons designated by the United States Attorney General, whether the defendant, ARNOLDO OZUNA GALAN, will be allowed to serve the remainder of his sentence in a Mexican prison, and the United . . .